SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 25
Issue 1 *Annual Survey of Texas Law*

Article 13

1971

Texas Civil Procedure

W. Ted Minick

A. D. Bynum

TEXAS CIVIL PROCEDURE

by

W. Ted Minick and A. D. Bynum***

PROCEDURAL issues continue to predominate in reported cases. This fact alone is not surprising since procedure is the common denominator for all reported cases. However, a comprehensive perusal of the several hundred cases decided in the past year[1] dealing with procedural issues makes it apparent that other factors contribute to the proliferation of such issues. These factors are: (1) expansive and sometimes confusing judicial interpretations of established rules to fit new factual contexts, and (2) failure of some members of the bar to adhere to established rules. The demand placed upon trial and appellate lawyers to have quick recall of hundreds of rules with multiple judicial interpretations becomes, at times, overwhelming. Unfortunately, the trend is toward even more complex procedure.

The purpose of this Article is to explicate some of the more significant developments in this area of the law in the past year. The bulk of the textual material will deal with those areas in which the authors found the appellate courts to be most active.

Pleadings. Defendants seem to have had more difficulty with pleadings in the past year than did plaintiffs. For example, in *Craig v. Genie Toys, Inc.*,[2] a suit on a sworn account, the defendant's answer and affidavit stated "the amount prayed for in Plaintiff's original petition is not just or true."[3] The affidavit also stated that the amount prayed for in the plaintiff's original petition was "not due either wholly or in part."[4] The court of civil appeals held that the defendant did not comply with the provisions of rule 185,[5] and thus would not be permitted to deny the claim. The court pointed out that the defendant did not state that the *claim* was not just or true in whole or in part, but only that the *amount prayed for* was not just or true. Thus, since the plaintiff's petition prayed for attorney's fees, interest, and costs, the defendant had not properly denied the claim which formed the basis of the suit. This case emphasizes the technical requirements imposed by the courts in certain situations, particularly where sworn pleadings are required.

The requirements of rule 95[6] were at issue in *Harrison v. Leasing*

* B.A., Eastern Washington State College; J.D., Southern Methodist University; Attorney at Law, Dallas, Texas.

** B.A., Abilene Christian College; J.D., Baylor University; Attorney at Law, Dallas, Texas.

[1] Volumes 443 through 456 of the *South Western Reporter, Second Series.*

[2] 444 S.W.2d 309 (Tex. Civ. App.—Houston 1969).

[3] *Id.* at 310.

[4] *Id.*

[5] TEX. R. CIV. P. 185 required the defendant to state on his oath that the claim against him was "not just or true, in whole or in part . . . ." Effective January 1, 1971, this language has been changed to "stating that each and every item is not just or true, or that some specified item or items are not just and true."

[6] TEX. R. CIV. P. 95 provides: "When a defendant shall desire to prove payment, he shall file

Associates, Inc.,[7] a suit on a promissory note. The defendant, in a sworn answer, alleged that $20,000 had been paid without credit. The plaintiff's motion for summary judgment was granted, and the court of civil appeals affirmed. Since the plea of payment was in general language, it was a pure conclusion and was not sufficient to preclude a summary judgment. Credits and offsets must be pled with specificity.

In another suit on a sworn account, *Fortinberry v. Freeway Lumber Co.*,[8] the defendant filed a proper sworn denial. The plaintiff then filed an amended petition adding a partnership composed of the original individual defendants but leaving the substance of the claim unaltered. The trial court refused to allow the defendant to deny the sworn account. The court of civil appeals reversed, apparently relying upon rule 92.[9] The plaintiff argued that rule 92 applied only to general denials, but the court rejected the argument: "We think the account remained the same and the plaintiff had no occasion to be misled by the failure of the appellant to repeat his denial in the form set out in Rule 185."[10] The opinion does not mention whether the new defendant, the partnership, filed an answer. Thus, it would appear that the partnership failed to comply with rule 185. The court found support in McDonald's *Texas Civil Practice*[11] and the decision is probably correct, but reliance upon rule 92 appears misplaced.

In *Pewthers v. Holland Page Industries, Inc.*,[12] one of the two defendants died after filing his answer. A writ of *scire facias* was issued notifying his executor that he had a certain number of days to appear in defense. After this time had elapsed, the executor had not filed an answer. Pursuant to a motion of the plaintiff, a default judgment was rendered against the defendant's estate. The court of civil appeals reversed, holding that an executor appearing pursuant to a writ of *scire facias* does not have to file an answer but rather adopts the pleadings of the deceased party.[13]

Kaine v. Cooney[14] involved the opposite side of a similar issue. This case, a suit on a mechanic's and materialman's lien with multiple defendants and multiple lots of land, was a result of the consolidation of several pending causes. Upon consolidation, the parties were ordered to replead. In repleading, the plaintiff omitted three of the original de-

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with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

[7] 454 S.W.2d 808 (Tex. Civ. App.—Houston 1970).

[8] 453 S.W.2d 849 (Tex. Civ. App.—Houston 1970).

[9] TEX. R. CIV. P. 92 provides: "A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. Where the defendant had pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff."

[10] 453 S.W.2d at 852.

[11] 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 8.10 (1970).

[12] 443 S.W.2d 392 (Tex. Civ. App.—Austin 1969).

[13] The court also held that since TEX. R. CIV. P. 330(b) provides that settings will be made in the month preceding the month of the setting, the court could not render a valid default judgment where the setting was not made in the prior month.

[14] 448 S.W.2d 223 (Tex. Civ. App.—San Antonio 1969).

fendants. The appellate court held that the omitted parties were just as effectively dismissed from the suit as if a formal dismissal as to them had been entered.

In another case, the pleadings were found to be sufficient but the parties were not. In *Hampton v. Sharp*[15] attorneys for two of the four defendants filed answers on behalf of all four, without the knowledge of two of the defendants. The trial court allowed a withdrawal of appearance for the two unknowing defendants. The appellate court affirmed on the grounds that the two defendants had no knowledge of the suit and had not authorized the attorneys to make an appearance for them. The court also indicated that the question of whether such action would be prejudicial to the plaintiffs was relevant.

One appellate court, in *Willis Sears Trucking Co. v. Pate*,[16] was confronted by an "inexcusable barbarism . . . sired by indolence and damned by indifference."[17] The cause of the court's consternation was the phrase "and/or" in the plaintiff's petition. The court could only adopt the "choice judicial epithets heaped upon this 'confusing hybrid' "[18] contained in two A.L.R. annotations.[19] The allegations concerned the acts of an employee and his employer. The court held that it could not distinguish to whom the plaintiff was referring in particular allegations of negligence because of the phrase "and/or." The plaintiff should have made separate allegations for each of the parties or separate conjunctive and disjunctive allegations.

In a suit for cancellation and recission of a guaranty on a note, the plaintiff denied under oath that he had signed the guaranty agreement. During the trial, the defendant's special exception to the plea of *non est factum* was granted. The trial court denied the plaintiff's motion to amend to delete the words "to the best of his information and belief." The appellate court in *Einhorn v. Irving Bank & Trust Co.*[20] held this to be reversible error, since rule 66[21] requires that trial amendments be allowed unless they would prejudice the opposite party.

Jurisdiction. Connell v. Shanafelt[22] was the only case reaching the appellate courts during the survey period involving substantive jurisdiction of the court. There, the plaintiff sought foreclosure of a mechanic's and materialman's lien.[23] The court of civil appeals held that the county court did not have jurisdiction of such a suit even though the actual amount in controversy was within its jurisdictional limits, and that such an action may be brought only in a district court.

Several cases were decided involving procedural jurisdiction. *Collins*

[15] 447 S.W.2d 754 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*
[16] 452 S.W.2d 782 (Tex. Civ. App.—Beaumont 1970).
[17] Cochrane v. Florida East Coast Ry., 107 Fla. 431, 432, 145 So. 217, 218 (1932).
[18] 452 S.W.2d at 784.
[19] Annot., 154 A.L.R. 866 (1945); Annot., 118 A.L.R. 1367 (1939).
[20] 443 S.W.2d 56 (Tex. Civ. App.—Eastland 1969).
[21] TEX. R. CIV. P. 66.
[22] 446 S.W.2d 126 (Tex. Civ. App.—Fort Worth 1969).
[23] TEX. REV. CIV. STAT. ANN. art. 5452 (1964).

v. Mize[24] involved a sale of Texas realty consummated within Texas by the defendant and others. The defendant subsequently removed from the state. The Texas supreme court held that the defendant's contacts with Texas were sufficient, as against a due process challenge, to sustain jurisdiction under article 2031b.[25] In view of the federal court's construction of article 2031b, that the Texas legislature intended to exercise the full constitutional limits of long-arm jurisdiction,[26] this decision is not surprising.

In *Van Winkle-Hooker Co. v. Rice*[27] the non-resident defendant lost a 120a[28] motion and then asked for a dismissal on the basis of *forum non conveniens*. The sole ground advanced for such motion was that the defendant resided out-of-state. The trial court granted the motion, but the appellate court reversed, holding that the burden was upon the party seeking dismissal to bring forward evidence of probative force that he would actually be substantially inconvenienced by a trial in the foreign state. The mere fact of out-of-state residence was insufficient.

In *Aamco Automatic Transmissions, Inc. v. Evans Advertising Agency, Inc.*[29] Evans was awarded a default money judgment against Aamco, a non-resident defendant who had been served under rule 108.[30] The court held that error was present on the face of the record, since rule 108 does not vest Texas courts with jurisdiction to render a personal judgment against a non-resident. The rule is nothing more than a means of providing notice to a non-resident of a suit involving realty located within the state.[31]

In *Neal v. Roberts*[32] the plaintiff urged two separate grounds for obtaining jurisdiction over the defendant. Kent held a power of attorney from Neal which authorized Kent to act in certain capacities regarding certain property. In a suit against both Neal and Kent for services performed, the plaintiff served Kent only, relying upon either the power of attorney, or, alternatively, article 2033b,[33] to obtain jurisdiction over Neal. The court held that since the power of attorney did not expressly authorize Kent to accept service of process for Neal, service upon Kent was insufficient as to Neal. The article 2033b grounds were also disapproved, because the serving officer did not certify his inability to locate Neal. Thus, since Neal was not legally served, did not enter an appearance,

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[24] 447 S.W.2d 674 (Tex. 1969).

[25] TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

[26] Barnes v. Irving Trust Co., 290 F. Supp. 116 (S.D. Tex. 1968).

[27] 448 S.W.2d 824 (Tex. Civ. App.—Dallas 1969).

[28] TEX. R. CIV. P. 120a provides that any party may, by sworn motion, make a special appearance for the purpose of objecting to the jurisdiction of the court.

[29] 450 S.W.2d 769 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

[30] TEX. R. CIV. P. 108.

[31] VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 21 Sw. L.J. 155, 156 (1967).

[32] 445 S.W.2d 58 (Tex. Civ. App.—Houston 1969).

[33] TEX. REV. CIV. STAT. ANN. art. 2033b (1964) provides for service of process on an agent who resides in a county other than the county of residence of the principal. A requirement for the use of art. 2033b is that the process sought to be served on the principal be returned with the certification "that after diligent search and inquiry a principal cannot be found and served . . . ."

and was not dismissed, the judgment against Kent was interlocutory and the cause was unappealable.

Parties. Texas community property laws continued to create problems in cases where a cause of action accrues to a married woman. *Charter Oak Fire Insurance Co. v. Few*[34] illustrates the reluctance of Texas courts to fully accept legislative efforts to grant a greater degree of independence to married women. In *Charter Oak* a wife brought suit to recover workmen's compensation benefits, joining her husband as a pro forma party. The husband appeared at the trial and testified on behalf of the wife. The judgment awarded the recovery to the husband and wife and used the plural "plaintiffs," as opposed to the singular "plaintiff" used in the pleadings. The court of civil appeals held that the husband was a mere pro forma party and was not a protagonist according to the dictionary definition of that term. As such, the husband was without any right to control or direct the course of the suit and could not recover affirmative relief. Since workmen's compensation benefits are community property, he was a legal owner of any compensation recovered and was therefore a necessary and indispensable party to the suit. The court rejected the holding in *General Insurance Co. of America v. Casper*[35] and relied upon *Petroleum Anchor Equipment Co. v. Tyra.*[36] The rendition of the judgment in favor of both husband and wife was not sufficient to cure the error. Justice Moore put forth a well-reasoned dissent, relying primarily upon article 4626.[37] He argued that the second sentence of the article was permissive rather than mandatory. He also argued that the husband was a sufficiently active participant in the trial to be considered a formal party. The dissent appears to have the better argument, particularly on the statutory grounds. However, until such time as appellate courts fully accept article 4626,[38] it appears advisable to include the husband as a formal party, particularly in suits for workmen's compensation benefits.

Subrogation suits also pose serious difficulties for Texas courts in determining necessary and indispensable parties. In *Price v. Couch*[39] Price's carrier repaired his automobile and was subrogated to his claim against Couch. Couch filed suit against Price for damages arising out of the same accident. The suit resulted in an agreed judgment. Before the judgment was entered, Price brought suit against Couch in a separate action. After the first suit had been terminated, Price's carrier alleged that it was the real party in interest under its assignment. The trial court granted Couch's motion for summary judgment in the second suit on the basis that the

[34] 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970), *error granted.*

[35] 431 S.W.2d 31 (Tex. 1968). Here it was held that the non-joinder of the husband of a workmen's compensation claimant was not fundamental error.

[36] 406 S.W.2d 891 (Tex. 1966). *See* text accompanying note 48 *infra.*

[37] TEX. REV. CIV. STAT. ANN. art. 4626 (Supp. 1970) provides: "A spouse may sue and be sued without the joinder of the other spouse. When claims or liabilities are joint and several, the spouses may be joined under the rules relating to joinder of parties generally."

[38] TEX. REV. CIV. STAT. ANN. art. 4626 (Supp. 1970).

[39] 448 S.W.2d 862 (Tex. Civ. App.—Houston 1969), *error granted.*

cause of action was a compulsory counterclaim under rule 97(a)[40] and was thus barred by res judicata. The court of civil appeals affirmed, holding that the carrier had a duty to intervene and file its counterclaim in the first suit and when it failed to do so, the action was barred by the previous judgment. Thus, the carrier was held to be a necessary party but not an indispensable party. The result was that the absence of the carrier in the first suit was not fundamental error which would require reversal, but since the carrier was a necessary party, it was bound by the first suit. However, the Supreme Court of Texas reversed, holding that neither prior case law nor rule 97(a) imposes a duty on the insurer to intervene in cases where the first suit was filed by a party other than the insured.[41] *Traders & General Insurance Co. v. Richardson*[42] and *Garrett v. Matthews*[43] were distinguished on the grounds that in those cases the first suit had been filed by the insured. Rule 97(a) was construed to apply only to a "pleader."[44] A dissent argued that the majority's decision violated the rule against splitting causes of action. This result may well be justified under the facts of the case, which are not uncommon. However, the decision seems to settle the question raised in last year's *Survey* article[45] with regard to *Thoreson v. Thompson*,[46] in that a subrogated insurance company is not an indispensable party. *Thoreson* was not mentioned in the instant case.

The question of necessary and indispensable parties arose under a point of error alleging improper severance in *Swafford v. Holman*.[47] The plaintiff sued two finance companies and two attorneys employed by one of the finance companies for damages arising out of wrongful attempts to enforce a judgment. The trial court severed the suits against the two attorneys and thereafter granted summary judgment in their favor. The appellate court affirmed, holding that since the trial court has broad discretion to grant severance, and since the case involved joint and several liability, it was not error to sever. The court quoted the familiar tests set out in *Petroleum Anchor Equipment Co. v. Tyra*:[48] An "indispensable party" is one who claims such an interest in the matter that a judgment could not be rendered without his being a party, while a "necessary party" is one who only claims an interest in the matter but who has a severable interest. Under the rule of *Landers v. East Texas Salt Water Disposal Co.*[49] the plaintiff could sue any one of the tort-feasors separately. Thus, the two individuals were not indispensable parties to the suit against the finance companies.

In contrast to the above cases, a court of civil appeals in *O'Byrne v.*

[40] TEX. R. CIV. P. 97(a).
[41] 14 Tex. Sup. Ct. J. 83 (1970).
[42] 387 S.W.2d 478 (Tex. Civ. App.—Beaumont 1965), *error ref.*
[43] 343 S.W.2d 289 (Tex. Civ. App.—Amarillo 1961).
[44] 14 Tex. Sup. Ct. J. at 84.
[45] McElhaney, *Texas Civil Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 179, 182 (1969).
[46] 431 S.W.2d 341 (Tex. 1968).
[47] 446 S.W.2d 75 (Tex. Civ. App.—Dallas 1969).
[48] 406 S.W.2d 891, 893 (Tex. 1966).
[49] 151 Tex. 251, 248 S.W.2d 731 (1952).

Oak Park Trust & Savings Bank[50] held that in an action to set aside a deed where the grantee had subsequently conveyed an easement to the Texas Gas Corporation, the corporation was a necessary party. The court could not adjudicate the case without the corporation before it. Thus, the corporation was an indispensable party under the rule in *Petroleum Anchor*.[51]

Continuance. Two cases decided in the past year uphold the proposition that the trial court has great discretion in the management of its docket, limited only by due process requirements and the Texas Rules of Civil Procedure.[52] In *Combined Underwriters Life Insurance Co. v. Wells*[53] the plaintiff and defendant, on January 10, agreed before the court to postpone the trial to January 27. However, the court called the case to trial on January 16, the defendant's counsel having received notice on January 15 after he had begun trial of another case. When the defendant did not appear, the trial court entered a default judgment in favor of the plaintiff. The appellate court reversed, holding the procedure violative of due process and contrary to the mandate and objectives of the Rules of Civil Procedure. In the second case, *Marchyn v. Silva*,[54] the cause was set for trial and was second on the docket. The defendant's counsel, who officed some forty-two miles from the seat of the court, learned from an undisclosed source that the first case would probably go to trial. When the instant case was called for trial, plaintiff's attorney was present. The trial court had had no communication from the defendant's counsel until an associate from his office telephoned the court shortly before 11:00 a.m. The trial judge advised him that jury selection would begin immediately. By the time the attorney arrived, a jury had been selected. The attorney submitted a motion for continuance, advising the court that he would be ready to proceed if the jury would be discharged and another selected. The motion was refused. He then sought to exercise six peremptory challenges, which were also denied. The court of civil appeals held that the trial court did not abuse its discretion in proceeding to select a jury under the circumstances. The court went on to say that in these days of crowded dockets, the co-operation of all parties is essential. The distinction between the two cases is, of course, the source of the absent attorney's reliance. In the first case, the attorney relied upon the directions of the court, while in the latter he relied upon an unofficial source. Thus, these cases constitute a strong warning to busy attorneys that failure to maintain contact with the court as to trial settings can result in a loss of valuable rights.

Venue. A number of interesting venue cases were decided in the last year. Even though venue privileges are considered a valuable personal right,

[50] 450 S.W.2d 411 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*
[51] *See* text accompanying note 48 *supra*.
[52] *See, e.g.*, TEX. R. CIV. P. 330.
[53] 446 S.W.2d 733 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*
[54] 455 S.W.2d 442 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*

Jones v. Klein[55] stands for the proposition that one individual appearing in a lawsuit in two different capacities may file a single pleading of privilege. The force of venue rights was asserted in *Alamo Express, Inc. v. Stansell*,[56] where the defendants did not appear at the venue hearing and the trial court overruled the plea of privilege without hearing any evidence. The appellate court reversed, holding that the filing of a plea of privilege constitutes prima facie proof of the defendant's right to a change of venue and the burden is therefore cast upon the plaintiff to both plead and prove facts to bring the case within one of the venue exceptions under article 1995.[57]

LaFors v. Finkner,[58] a case decided under subdivision 5 of article 1995,[59] focused upon the place of performance by the defendant in determining proper venue. The contract, sued upon in Gray County, involved the purchase of cattle located in Scurry County and to be shipped to Hale County by the defendant. Scurry County was held to be the proper place of venue because the defendant was obligated to perform there.

Products liability cases raise some troublesome questions in determining venue. In *Ford Motor Co. v. Ted Arendale Ford Sales, Inc.*[60] the plaintiff purchased a Ford automobile from the defendant. The muffler assembly apparently was defective and the plaintiff returned the automobile to Arendale for repairs several times. Subsequently, while backing up, the muffler assembly dropped, causing the car to spin around and resulting in bodily injuries to the plaintiff. Suit was brought against both Arendale and Ford Motor Company. Ford filed a plea of privilege which was overruled. The appellate court held that this case was governed by subdivision 4.[61] Since the plaintiff had made out a prima facie case of negligence against Arendale, accruing in the forum county, and since the cause of action was joint, venue was sustainable. Alternatively, the court held that venue in the forum county was proper under subdivision 27.[62] The alternative holding was based upon the Texas supreme court holding in *Darryl v. Ford Motor Co.*[63] that circumstantial evidence pointing to a latent defect in the product is sufficient to establish a cause of action. By

[55] 451 S.W.2d 788 (Tex. Civ. App.—Houston 1970).

[56] 445 S.W.2d 222 (Tex. Civ. App.—San Antonio 1969).

[57] TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

[58] 448 S.W.2d 574 (Tex. Civ. App.—Tyler 1969).

[59] TEX. REV. CIV. STAT. ANN. art. 1995, § 5 (1964) provides: "If a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile."

[60] 447 S.W.2d 775 (Tex. Civ. App.—Fort Worth 1969).

[61] TEX. REV. CIV. STAT. ANN. art. 1995, § 4 (1964) provides in part: "If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides."

[62] TEX. REV. CIV. STAT. ANN. art. 1995, § 27 (1964) provides: "Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside."

[63] 440 S.W.2d 630 (Tex. 1969).

the language used in *Darryl*—"[t]here is no other explanation in this record for the cause of the accident"[64]—products liability theory seems closely analagous to *res ipsa loquitur*.[65]

A similar case was *Rey-Clif Co. v. Spence*,[66] where the plaintiff purchased a defective mobile home from Thompson Trailer Sales in Harris County, the home county of the plaintiff. A wheel came off the trailer in New Mexico. The plaintiff sued Thompson, Rey-Clif Company, and Mobil Scout Manufacturing Company, the latter two being manufacturers of the trailer. The pleas of privilege of Mobile Scout and Rey-Clif were overruled, and Rey-Clif appealed. Plaintiff urged subdivisions 23[67] and 29a,[68] and on appeal, subdivision 9a.[69] The appellate court reversed, holding that the home county of Rey-Clif was the proper county for venue. Since plaintiff offered no evidence that Thompson Trailer Sales resided in Harris County, subdivision 4 was not applicable. Subdivision 23 could not sustain venue because the plaintiff did not prove a cause of action against Rey-Clif that arose in part in Harris County or that Rey-Clif had an agent or representative there. Subdivision 29a was insufficient because Rey-Clif was not a necessary party within the meaning of that subdivision. Subdivision 9a was rejected because there was no evidence of any act or omission of negligence occurring in Harris County. While the holding in this case appears to be opposite to that in *Arandale*, there was actually a failure of proof in *Rey-Clif*. Had plaintiffs established that Thompson Trailer Sales resided in Houston, venue could have been sustained under subdivision 4 as it had been in *Arendale*.

Southwestern Transfer Co. v. Slay[70] presented the Beaumont court of civil appeals with a conflict of presumptions. The plaintiff pleaded *res*

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[64] *Id.* at 633.

[65] *See* text following note 74 *infra*.

[66] 447 S.W.2d 764 (Tex. Civ. App.—Houston 1969).

[67] TEX. REV. CIV. STAT. ANN. art. 1995, § 23 (1964) provides in part:

> Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association, or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association, or joint stock company then had an agency or representative.

[68] TEX. REV. CIV. STAT. ANN. art. 1995, § 29a (1964) provides: "Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants, then such suit may be maintained in such county against any and all necessary parties thereto."

[69] TEX. REV. CIV. STAT. ANN. art. 1995, § 9a (1964) provides:

> A suit based upon negligence per se, negligence at common law or any form of negligence, active or passive, may be brought in the county where the act or omission of negligence occurred or in the county where the defendant has his domicile. The venue facts necessary for plaintiff to establish by the preponderance of the evidence to sustain venue in a county other than the county of defendant's residence are:
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> 1. That an act or omission of negligence occurred in the county where the suit was filed.
> 2. That such act or omission was that of the defendant, in person, or that of his servant, agent or representative acting within the scope of his employment.
> 3. That such negligence was a proximate cause of plaintiff's injuries.

[70] 455 S.W.2d 352 (Tex. Civ. App.—Beaumont 1970).

ipsa loquitur and the defendant filed a plea of privilege which was controverted under subdivision 23[71] and which the trial court overruled. The court of civil appeals reversed, holding that subdivision 23 required full proof of a cause of action which arose in the county where suit is brought. Proof of a prima facie cause of action was insufficient. Since *res ipsa loquitur* is only a rule of evidence and at most makes out a prima facie case, the pleadings and proof were not sufficient to maintain venue. The court stated:

> The net effect of the two competing doctrines in this venue case has resulted in a procedural impasse which plaintiff cannot surmount. Defendant's plea of privilege created a prima facie right to a transfer of the cause until such time as plaintiff overcame such right by pleading and proof. Plaintiff, through the use of the doctrine of res ipsa, proved only a prima facie cause of action. We are admonished by *Goodrich* . . . in the case of an equal doubt between the right to the transfer and the exception, to resolve the doubt in favor of the transfer.[72]

The majority sought to distinguish the cases relied upon by the plaintiff, in which it was urged that only a prima facie case was necessary. The majority found that only three of those cases were applicable and that all three involved the so-called "branded vehicle doctrine."[73] That doctrine was distinguished from *res ipsa loquitur* in that the latter is not a true presumption but only an occurrence that warrants an inference of negligence. Judge Stephenson, in a strongly-worded dissent, argued that a prima facie case was all that was necessary under subdivision 23. He argued that if this had been a trial on the merits, the evidence would support a judgment, and that no greater burden should be placed upon the plaintiff in a venue hearing. He cited over thirty cases holding that a lesser burden of proof is placed upon the plaintiff in a venue hearing than in the trial on the merits. The majority holding in this case seems opposed to that of the Fort Worth court of civil appeals in *Ford Motor Co. v. Ted Arendale Ford Sales, Inc.*[74] The doctrine of *res ipsa loquitur* is similar to that of strict liability in products-liability cases, as discussed in the latter case. The difference is that *res ipsa loquitur* has been characterized as a rule of evidence or procedure, whereas strict liability is a rule of substantive law. For venue purposes, it becomes difficult to justify the distinctions created by these two cases.

The question of venue in uninsured motorist cases was faced in *Pioneer Casualty Co. v. Johnson.*[75] The supreme court held that since the plaintiff proved uninsured motorist coverage, a collision with an uninsured motorist, and damages, the trial court was correct in overruling the plea of privilege. The plaintiffs sued upon a judgment against the bankrupt

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[71] *See* note 67 *supra.*

[72] 455 S.W.2d at 356.

[73] *See* Burlington Indus. v. Holladay, 372 S.W.2d 730 (Tex. Civ. App.—Amarillo 1963); Austin Road Co. v. Willman, 303 S.W.2d 878 (Tex. Civ. App.—Fort Worth 1957); Austin Bros. v. Sill, 83 S.W.2d 716 (Tex. Civ. App.—El Paso 1935).

[74] 447 S.W.2d 775 (Tex. Civ. App.—Fort Worth 1969).

[75] 450 S.W.2d 64 (Tex. 1970).

uninsured motorist, and pleaded subdivision 23.[76] The dissent noted the court's difficulty in distinguishing *Pan American Fire & Casualty Co. v. Loyd*[77] by quoting from *Loyd* language to the effect that proof of negligence is required. In the dissent's view, the majority's decision relieved the plaintiff of the burden of proving negligence and proximate cause. The dissent seems to have the better of the argument, since proof of negligence and causation is required in order to establish a jury case under an uninsured motorist policy.[78]

Summary Judgments. Summary judgment procedure continues to be the subject of conflicting opinions by the appellate courts. This one area of the law caused more issues to be raised on appeal than any other in the past year. Even though the basic premises of the procedure seem to be well established, trial and appellate courts continue to have difficulty in applying them. These problems caused members of one court to caution against undue haste in attempts to dispose of cases under rule 166-A.[79] In another case, the summary judgment procedure in a tort situation was unsuccessfully attacked as unconstitutional.[80]

The basic premise of the summary judgment procedure was set out once again by the Texas supreme court in *Gibbs v. General Motors Corp.*[81] This was a suit based upon manufacturer's liability where the defendant offered in support of its motion for summary judgment the affidavit of an expert, stating that the failure of the unit in question was not the result of a defect in manufacture. The supreme court reversed a summary judgment, holding:

> Stating the issue as to whether the summary judgment proof raises a fact issue illustrates a basic fallacy found in the approach to summary judgments. In such cases, the question on appeal, as well as in the trial court, is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of the fact* as to one or more of the essential elements of the plaintiff's cause of action.[82]

Thus, expert opinion testimony does not establish the fact (here the cause of the malfunction) as a matter of law in cases of this type. On this point, the court cited *Broussard v. Moon.*[83] The court refused to follow

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[76] *See* note 67 *supra.*

[77] 411 S.W.2d 557 (Tex. Civ. App.—Amarillo 1967).

[78] Uninsured motorist clauses typically provide that the insurer will "pay all sums which the insured . . . shall be *legally entitled* to recover . . . from the owner or operator of an uninsured automobile." 450 S.W.2d at 65 n.1 (emphasis added).

[79] O'Byrne v. Oak Park Trust & Sav. Bank, 450 S.W.2d 411 (Tex. Civ. App.—Beaumont 1970). TEX. R. CIV. P. 166-A details the standards to be observed in grant or denial of a summary judgment.

[80] Swafford v. Holman, 446 S.W.2d 75 (Tex. Civ. App.—Dallas 1970).

[81] 450 S.W.2d 827 (Tex. 1970).

[82] *Id.* at 828 (emphasis in original).

[83] 431 S.W.2d 534 (Tex. 1968).

Markwell v. General Tire & Rubber Co.[84] because that case was based upon the federal rule and was therefore "not . . . persuasive."[85]

In *Rio Bravo Oil Co. v. Hunt Petroleum Corp.*,[86] a trespass-to-try-title suit, both parties moved for summary judgment. The plaintiff's motion was overruled because his proof did not show notice of the adverse claim. The trial court then granted the defendant's motion because plaintiff's summary judgment proof had failed to establish this essential element. The Texas supreme court reversed, holding that at the summary judgment stage, a party's failure to discharge the burden which will rest on him at a trial on the merits is not sufficient grounds to grant summary judgment against him.

A similar situation involving motions for summary judgment filed by both parties was presented to the Texas supreme court in *DeBord v. Muller*.[87] Jones executed a promissory note to Muller and delivered a chattel mortgage on a boat as security. The mortgage was duly recorded. Upon default, Muller sued for the amount of the note and foreclosure. Judgment was rendered for the amount of the note but was silent on the prayer for foreclosure. Jones sold the boat to DeBord, who in turn sold it to Anderson. Muller then filed suit seeking damages for conversion, or, alternatively, foreclosure of the mortgage. Muller filed a motion for summary judgment supported by certified copies of the chattel mortgage and judgment against Jones. A hearing on the motion was held and the court took the matter under advisement. DeBord then filed a motion for summary judgment, setting up the defense of res judicata, which was supported by certified copies of plaintiff's judgment and pleadings against Jones. The court granted Muller's motion for summary judgment against DeBord and denied DeBord's motion against Muller.[88] The Texas supreme court reversed, holding that both motions were entitled to be treated with "equal dignity."[89] Since both motions were before the court at the time judgment was rendered, all the evidence accompanying DeBord's motion was likewise evidence in considering Muller's motion and vice versa. Thus, an affidavit need not be specifically directed to a particular motion for summary judgment to be considered by the court. The evidence attached to DeBord's motion was before the court, and it rendered plaintiff's motion for summary judgment unsupportable.

The requirements for a summary judgment in a slip-and-fall case were discussed in *Wampler v. Bill Sears Super Markets*.[90] The defendant's motion for summary judgment was supported by the store manager's affidavit stating that he had been down the aisle where the accident occurred five minutes before the fall and had seen no peach seed or peeling on the floor. The plaintiff filed an affidavit describing the fall and the pres-

[84] 367 F.2d 748 (7th Cir. 1966).
[85] 450 S.W.2d at 829.
[86] 455 S.W.2d 722 (Tex. 1970).
[87] 446 S.W.2d 299 (Tex. 1969).
[88] DeBord's motion was denied because he had failed to *plead* res judicata. *Id.* at 301.
[89] *Id.*
[90] 452 S.W.2d 526 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

ence of the peach seed. The trial court granted defendant's motion for summary judgment. The court of civil appeals reversed, holding that the movant had not shown as a matter of law that no material fact issue existed. The court relied upon *Scott v. T. G. & Y. Stores*[91] and stated:

> In that case the court states that in order to be entitled to summary judgment pursuant to motion, the defendant has the negative burden of showing that plaintiffs had no cause of action against it; as, for example, before it could be entitled to summary judgment on its motion, the defendant had the burden of showing that its employees did not put the liquid on the floor; that its employees did not know that the substance was on the floor; and that the substance had not been on the floor for such a length of time and under such circumstances that a person of ordinary prudence in the exercise of ordinary care would have discovered and removed it.[92]

Thus, the movant must negate all possible theories of liability.

The opposite side of the coin was presented in *Snider v. Forrest Lumber Co.*,[93] a trespass-to-try-title suit. The plaintiff moved for summary judgment, attaching certified copies of an abstract of title. The abstract included a deed of trust containing a provision that a sale by the trustee raised a presumption that everything necessary to authorize the sale and to render it valid existed and had been performed. The defendant filed an affidavit stating that he and his wife had no actual notice of the sale. The trial court entered a summary judgment for the plaintiffs. The court of civil appeals affirmed, holding that actual notice was not necessary under the deed of trust and that the defendant's affidavit did not raise a *material* issue. The defendant also argued that the plaintiff failed to negate all possible defenses. The court rejected this argument, stating that "in summary judgment proceedings in a trespass to try title suit, when the moving party establishes by competent summary judgment evidence the non-existence of an issuable fact, it then becomes incumbent upon the adverse party to file counter-affidavits or other summary judgment evidence creating an issue of material fact . . . ."[94] While it may not be appropriate to compare summary judgment proceedings in a trespass-to-try-title case with those in a negligence case, these decisions reveal a difference in the burden between a plaintiff and a defendant moving for summary judgment. Absent summary judgment evidence by the opposing party, the defendant must negate all possible theories of liability before he will be entitled to a summary judgment, while the plaintiff need only establish one theory to entitle him to a summary judgment.

A similar case is *Harrington v. YMCA*,[95] a declaratory judgment action involving the issue of whether a proposed building in a restricted subdivision would violate zoning restrictions. The YMCA offered in support of its motion for summary judgment an unsworn resolution by its board

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[91] 433 S.W.2d 790 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*
[92] 452 S.W.2d at 528.
[93] 448 S.W.2d 130 (Tex. Civ. App.—Tyler 1969).
[94] *Id.* at 135.
[95] 452 S.W.2d 423 (Tex. 1970).

of directors that it did not intend to violate the restrictions. The Texas supreme court held that the judgment in favor of the YMCA must be reversed, since that party had the burden to show that its building and uses would not as a matter of law violate the restrictions. The unsworn resolution of intention did not furnish that proof. The question remains as to whether a sworn resolution would have been sufficient. Such a resolution would only show the current intention of the parties not to violate the restriction. This would appear to be a conclusion of law rather than fact.

A number of cases raise the issue of what constitutes summary judgment proof. In *Norsworthy v. American Lease Plan*,[96] a suit upon a written lease agreement, both parties filed unsworn pleadings. The plaintiff then filed an unsworn motion for summary judgment which was not answered by defendant but which the trial court granted. The court of civil appeals held that a summary judgment on the pleadings may never be properly entered for the plaintiff when the defendant has a general denial on file. However, as held in *Rich v. Con-Stan Industries, Inc.*,[97] if the movant files an affidavit and the opponent files only unsworn pleadings, a genuine issue of fact is not raised, and the movant is entitled to summary judgment. But, in a suit on a sworn account, a sworn denial has the effect of neutralizing the affidavit of the plaintiff and thus prevents summary judgment.[98] *Maxey v. Rodman*[99] held that detailed pleadings of fraud and conspiracy do not preclude the granting of a summary judgment when the other party presents sworn summary judgment proof. Thus, opponents of summary judgment motions are compelled to provide sworn proof that competently raises an issue of material fact.

In *Le Tulle v. McDonald*[100] the court held that in a suit for an accounting under a trust, a will and codicil not included in the affidavit supporting the motion for summary judgment and not attached thereto nor served therewith were not entitled to consideration in a summary judgment hearing. Furthermore, it was held in *Peterson v. Burks Around the Clock Plumbing Co.*[101] that if the summary judgment opponent cannot file an affidavit prior to the hearing, he must comply with rule 166-A[102] by filing an affidavit showing why he was unable to present by affidavit the facts essential to justify the opposition to the motion for summary judgment. In the absence of such an affidavit, the trial court may deny a motion for continuance and grant the motion for summary judgment.

Peterson and *Mitchell v. Lawson*[103] re-affirm the rule that the affidavit of

[96] 447 S.W.2d 768 (Tex. Civ. App.—Houston 1969). *See also* National Soil Stabilizers, Inc. v. American Lease Plan, 448 S.W.2d 260 (Tex. Civ. App.—Houston 1969), in which the court held that where no affidavits or sworn pleadings were on file, no proof was presented and fact issues arose from the pleadings.

[97] 449 S.W.2d 323 (Tex. Civ. App.—Tyler 1969).

[98] Wilkinson v. Texas Employers' Ins. Ass'n, 444 S.W.2d 222 (Tex. Civ. App.—San Antonio 1969).

[99] 444 S.W.2d 353 (Tex. Civ. App.—El Paso 1969).

[100] 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969).

[101] 449 S.W.2d 859 (Tex. Civ. App.—Houston 1970).

[102] TEX. R. CIV. P. 166-A.

[103] 444 S.W.2d 192 (Tex. Civ. App.—San Antonio 1969).

an interested party is sufficient to support a summary judgment where his testimony is positive, clear, direct, and uncontradicted. However, *Rey v. American Capitol Insurance Co.*[104] indicates that in a suit on a promissory note, where attorney's fees are at issue, the affidavit of the plaintiff's attorney is questionable because he is an interested party.

In *Lampar Co. v. Stanfield* the affidavit of the appellee's attorney as to the ownership of the debenture in question was held to be insufficient for several reasons: "It is signed by one attorney for appellee and the petition is signed by another; it does not even recite that the affiant has read the petition or is familiar with its contents; and it does not set forth facts which would be admissible in evidence, but contains only conclusions of law."[105]

The court of civil appeals in *Langley v. Arnold D. Kamen & Co.*[106] held that an affidavit not showing that the affiant was competent to testify on its contents is not sufficient; neither is an affidavit which adopts the pleading. The court found other defects in the affidavit, such as the absence of proof that the fees and commissions in question were agreed upon or were usual, customary, or reasonable. Thus, the plaintiff did not carry the burden necessary to entitle it to a summary judgment.

The contents of the record in summary judgment cases received the attention of the court in *Meek v. Cain*,[107] where it was held that extrinsic documentary evidence not sworn to could not be considered by the court. However, the court can consider depositions on file, as held in *Blume v. Curson*,[108] and such depositions are includable in the transcript on appeal from a summary judgment.

Appellate Procedure. Appellate time limits were the subject of a number of cases during the survey period.[109] In *Boyd v. Gillman Film Corp.*[110] the trial court signed an order dismissing the case for want of prosecution. Four months later the trial court signed an order reinstating the cause and then rendered final judgment for the plaintiff. The defendant then filed suit seeking an injunction against the enforcement of the judgment, alleging that it was invalid and void. The court of civil appeals held that the judgment was void because the entry of the order of dismissal was a judicial function and not a clerical one. Therefore, the order reinstating the cause, which was entered more than thirty days from the rendition of judgment, was ineffective.[111] Thus, the judgment was void

[104] 450 S.W.2d 155 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*
[105] 451 S.W.2d 254, 255 (Tex. Civ. App.—Dallas 1970).
[106] 455 S.W.2d 820 (Tex. Civ. App.—Texarkana 1970), *error ref. n.r.e.*
[107] 452 S.W.2d 729 (Tex. Civ. App.—Tyler 1970).
[108] 447 S.W.2d 727 (Tex. Civ. App.—Houston 1969).
[109] *See* Smith, *Check List on Time Limits for Appeal in Texas*, 26 TEX. B.J. 299 (1963), for a table for determining these critical dates.
[110] 447 S.W.2d 759 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*
[111] TEX. R. CIV. P. 329b, § 5 provides in part: "Judgments shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial. After the expiration of thirty (30) days from the date the judgment is rendered or motion for new trial overruled, the judgment cannot be set aside except by bill of review for sufficient cause, filed within the time allowed by law."

because the trial court had lost jurisdiction.[112]

In *Gallagher v. Schlundt*[113] appellant's motion for new trial was filed on May 19, and on July 9, an order overruling the motion was signed. The appellant attempted to effect an appeal from this order to the court of civil appeals. However, the appellate court ruled that under rule 329b(4)[114] the motion for new trial was overruled by operation of law on July 3. Thus, the order entered on July 9 was a nullity. The record was filed with the court of civil appeals on September 8, some sixty-six days after the motion for new trial was overruled by operation of law. Thus, the court did not have jurisdiction to hear the appeal. On motion for rehearing, the appellant filed a supplemental transcript which contained an agreed motion of the parties postponing the hearing on the amended motion for new trial from June 2 to June 27. But since the latter date was within the forty-five-day period after the motion for new trial was filed, it did not postpone the time for determination of the motion past July 3.

In *Mercer v. Band*[115] judgment was entered on June 20, and on June 27 defendants filed their original motion for new trial. On July 14, defendants filed a motion captioned "Amended Motion for New Trial." The prayer in that motion asked only that the judgment be set aside and that defendants' motion for judgment be granted. It did not specifically ask for a new trial. On August 8, the trial court held a hearing on the second motion and ordered a new trial, but the formal order granting a new trial was not signed and entered until August 14. Thus, the announcement and docket sheet entry were made forty-two days after the filing of the original motion for new trial, and the former order was signed and entered forty-eight days after the motion for new trial. The court of civil appeals held that it did not have jurisdiction because the second motion was not a motion for new trial since it failed to comply with the rules applicable to such motions by not specifically requesting a new trial. Thus, it did not have any effect upon the original motion or the applicable timetable. The trial court's order on August 8 had no effect, so de-

[112] The court rejected the argument that the defendant had an adequate remedy at law by means of appeal. 447 S.W.2d at 763-64.

[113] 452 S.W.2d 529 (Tex. Civ. App.—San Antonio 1970), *error ref.*

[114] TEX. R. CIV. P. 329b, § 4 provides:

> It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after the same is filed. However, at the discretion of the judge, an original motion or amended motion for new trial may be presented or hearing thereon completed after such thirty (30) day period. Such delayed hearing shall not operate to extend the time within which the original or amended motion must be determined, unless such time be extended by agreement as provided for in the preceding subdivision of this Rule. In the event an original motion or amended motion for new trial be not presented within thirty (30) days after the date of the filing thereof, and the judge in his discretion refuses to consider the same or refuses to hear evidence relating thereto, such motion will be overruled by operation of law forty-five (45) days after the same is filed, unless disposed of by an order rendered on or before said date. In the event the decision of the motion is postponed by any written agreement as provided in subdivision 3 of this Rule then any such original or amended motion, if not determined by the court, will be overruled by operation of law ninety (90) days after the same is filed or on the latest day certain agreed upon, whichever occurs first.

[115] 454 S.W.2d 833 (Tex. Civ. App.—Houston 1970).

fendant's motion for new trial was overruled at the expiration of forty-five days. The court did hold that the trial court may grant a new trial within thirty days from the date the motion for a new trial is overruled by operation of law. *Fulton v. Finch*[116] was distinguished on the grounds that there the trial court sought to amend the original order *granting* a motion for new trial. Thus, in the instant case, the trial court had jurisdiction to grant a new trial, and such an order is not appealable.

Appellate time limits effectively terminated the appeal in *Home Insurance Co. v. Greene.*[117] Twelve months after judgment was entered it was amended by *nunc pro tunc* orders to include intervenors. The appellate court held that the first judgment was the final judgment and the trial court lost power to change the judgment when thirty days had expired.

Comet Aluminum Co. v. Dibrell[118] was a suit on a note where the trial judge orally announced a judgment in the principal amount of the note but denied attorney's fees. Two days after the announcement in open court, the judge signed the draft judgment awarding interest. Eight months later, the judge, on his own motion, entered a *nunc pro tunc* judgment deleting the award of interest. Subsequently, the judge granted a new trial to the defendant. The appellate court held that the judgment was rendered when announced in court, and that the provision in the written draft of judgment awarding interest was a rendition. The error was judicial and not clerical. Therefore, the *nunc pro tunc* judgment was void, and the subsequent granting of a motion for a new trial was likewise void. The appellate court indicated that the trial judge should set aside the *nunc pro tunc* judgment and order a new trial.

In *Bullock v. Land*[119] a default judgment was rendered on October 30, 1968. The defendant filed his answer on November 4. A motion for new trial was filed on November 18 and overruled on November 26. The notice of appeal appeared in the order, dated December 20, overruling the motion for a rehearing on the motion for a new trial. The cash deposit in lieu of an appeal bond was filed January 6, 1969. The appellate court dismissed the appeal, holding that since the motion for a new trial was not filed within ten days after rendition of judgment, it could not be considered in determining the time limit. Thus, the notice of appeal and bond were not filed within the requisite time.

In *Hancock v. Gathright*[120] the suit was dismissed for want of prosecution on July 14, and a motion to reinstate was filed on August 7 and answered on August 13. A sworn amended motion to reinstate was filed on August 28. The court held that the motion failed to satisfy the requirements of a bill of review and thus constituted a motion for new trial. As such, it was filed too late to extend the court's jurisdiction, and the order of reinstatement was void.

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[116] 162 Tex. 351, 346 S.W.2d 823 (1961).
[117] 443 S.W.2d 326 (Tex. Civ. App.—Texarkana 1969), *aff'd*, 453 S.W.2d 470 (Tex. 1970).
[118] 450 S.W.2d 56 (Tex. 1970).
[119] 443 S.W.2d 60 (Tex. Civ. App.—Eastland 1969).
[120] 451 S.W.2d 591 (Tex. Civ. App.—Waco 1970).

Green v. Davis[121] involved the time limit for filing the statement of facts. The sixty days expired on September 29. The statement of facts was received by the clerk of the court of civil appeals on September 25, but was not signed by counsel. The clerk called the submitting counsel's office but he was out of town. The clerk then mailed the statement of facts to the attorney, who procured the necessary signatures and placed the statement of facts in the mail on September 29. The clerk received it on October 2. After being notified that the clerk would not file the statement of facts, the counsel filed a motion for extension of time and the court ordered the clerk to file the statement of facts. The appellee was not notified of the motion for extension of time and filed a motion to strike the statement of facts. The court of civil appeals struck the statement of facts, since the timely filing of the record is jurisdictional and cannot be waived, and since the fact that appellant's counsel was ninety miles from court was insufficient justification to constitute good cause for mailing the records rather than hand delivering them.

A similar situation was faced in *Bracero Transportation Co. v. Crystal City Independent School District.*[122] The appellant sought an extension of time to file the statement of facts, which was due in the court of civil appeals on January 19. On January 13, the appellant's attorney mailed the statement of facts to the district clerk in the county where the case was tried, with instructions to forward it to the court of civil appeals. The district clerk received it on January 18, and the court of civil appeals received it on January 20 in an envelope postmarked January 19. The court of civil appeals held that the appellant did not properly comply with rule 5[123] since the statement of facts was mailed to the wrong clerk and the envelope received by the court-of-civil-appeals clerk was not postmarked one day before the due date. The facts did not present good cause for failing to file timely and the appellant's motion for extension of time was denied.

Several cases have shown that judgments should be drafted with particular care. In *Schell v. Centex Material Co.*,[124] the appellant sued the two defendants for damages for breach of contract. Centex, one of the defendants, filed a cross action and was granted a motion for summary judgment as to the appellant's suit against it. The judgment stated that "this cause [shall] proceed to trial upon the remaining issues set out in the Counterclaim of Defendant . . . and in the General Denial and Answer to Counterclaim of Plaintiff . . . ."[125] Four months later, the trial court rendered judgment on the cross action but the latter judgment did not incorporate the first one. The court of civil appeals held that

[121] 451 S.W.2d 579 (Tex. Civ. App.—Fort Worth 1970).

[122] 450 S.W.2d 772 (Tex. Civ. App.—San Antonio 1970).

[123] TEX. R. CIV. P. 5 provides, in part, that a court may enlarge a prescribed time period if the required documents are "sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and [are] deposited in the mail one day or more before the last day for filing the same . . . ."

[124] 450 S.W.2d 673 (Tex. Civ. App.—Austin 1970).

[125] *Id.* at 674.

the two judgments were interlocutory even though all of the matters pending were disposed of. Thus, no appeal could be had from either judgment.

In *Gentry v. McKnight Construction Co.*[126] the plaintiff sought to preserve a cause of action against one of two joint tort-feasors by specific language in the judgment. The actions were pending in separate counties because one tort-feasor's plea of privilege was sustained and the action transferred. The judgment recovered against the other recited: "It is the further order of this court that this judgment is a judgment against the defendant Jerry Lollar only, and by no means is to be considered as being a judgment against McKnight Construction Company of Commerce, Texas . . . ."[127] McKnight Construction Company filed a motion for summary judgment in the other suit, alleging the prior judgment as a release and bar. The appellate court held that McKnight was released because it is a fundamental rule that, regardless of the number of causes of action which may be lawfully brought for a tortious injury, only one satisfaction can be had. Apparently, the court felt that the language in the judgment against Lollar was insufficient because it did not constitute a reservation. The court did not explain what the legal effect of such reservation would be. Thus, the court implied that even the "fundamental rule" may be subject to limitation.

In *County of Harris v. Black*[128] the trial court, pursuant to the landowner's plea of abatement, "revested" a portion of the tract in question in the landowner and abated and dismissed the condemnation suit insofar as that fractional portion was concerned. The county appealed the order, but the court of civil appeals held that it was not appealable since the entire matter was not disposed of as to either issues or parties.

Stanley v. Helton[129] and *Yates v. Hogstrom*[130] held that the filing of a motion for new trial in a case where such a motion is not a prerequisite for appeal[131] does not limit the points of error which can be raised upon appeal. In *Weingarten, Inc. v. Moore*[132] the Texas supreme court held that mere reference to a prior motion in a motion for new trial was insufficient to preserve the error, even though the prior motion made a particular objection clear and certain.

The court of civil appeals in *Cotton Concentration Co. v. H. Molsen & Co.*[133] held that a joint motion of three appellees for rehearing of their separate actions against the same appellant, as if all three cases had been consolidated, would be dismissed for lack of jurisdiction where the judgment in each case was against a different party and for different amounts.

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[126] 449 S.W.2d 287 (Tex. Civ. App.—Texarkana 1969), *error ref. n.r.e.*
[127] *Id.* at 288.
[128] 448 S.W.2d 859 (Tex. Civ. App.—Houston 1969).
[129] 451 S.W.2d 299 (Tex. Civ. App.—Fort Worth 1970).
[130] 444 S.W.2d 851 (Tex. Civ. App.—Houston 1969).
[131] In both *Stanley* and *Yates* the motion for a new trial was not required because the original trial had not been before a jury. TEX. R. CIV. P. 324.
[132] 449 S.W.2d 452 (Tex. 1970).
[133] 454 S.W.2d 255 (Tex. Civ. App.—Texarkana 1970), *error granted.*

In *Donald v. First State Bank*[134] the court refused to consider the appellant's grounds of error where the motion for new trial merely stated: "The Court failed to submit defendant's defensive theories of the case."[135] Even though the appellant's brief was more specific, the court held that substantial compliance with the rules was not achieved.[136]

In keeping with the liberal interpretation of the rules as to appeal bonds, the Texas supreme court in *Owen v. Brown*[137] held that even though the party appealing must be named as principal of the appeal bond and must execute the bond as such, the courts are lenient in permitting amendments of almost any sort of instrument that can be said to be a bond. In this case, the appellant was granted leave to file an amended appeal bond.

In *Wood v. Cosme*,[138] a suit in the nature of a bill of review to set aside a previous adoption, the appellee filed an answer and cross action for adoption. The judgment recited that "the defendant's cross-action and all relief prayed for therein is hereby denied for the reason that Respondents presented no evidence in support of said cross-action."[139] Later, the appellee filed the instant suit, which was a new petition for adoption, and the appellants urged res judicata. The court of civil appeals held that in order to prevent the prior judgment from being res judicata, the record must show that: (1) before its rendition the involved party withdrew his pleadings and issues; or (2) the court refused to decide the issues; or (3) a party failed to appear and prosecute his case. A dismissal resulted because none of these grounds was present.

Voir Dire and Argument. In *Brockett v. Tice*[140] the plaintiff's counsel on *voir dire* inquired whether any of the jurors worked for an insurance company and whether they thought a verdict would affect their insurance rates. Also, while testifying, the plaintiff stated in an unresponsive answer that the defendant had said he had insurance. The appellate court held that, on the record as a whole, it appeared that the injection of insurance was reasonably calculated to cause and probably did cause the rendition of an improper judgment. The trial court's instructions to the jury were ineffective to remove the harm.

In *City of Houston v. Flanagan*,[141] while the jury was deliberating, the plaintiff was lying on her side on a bench across from the entrance to the courtroom. She had a wet cloth on her face and a grimace of pain. The jury was released for lunch and its members observed the plaintiff in this condition. The court held that since there was no showing that this scene had been contrived for the purpose of influencing the jury, the trial court did not abuse its discretion in denying the motion for mistrial.

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[134] 448 S.W.2d 196 (Tex. Civ. App.—Fort Worth 1969).
[135] *Id.*
[136] TEX. R. CIV. P. 320-22 require that a motion for a new trial be set forth with specificity.
[137] 447 S.W.2d 883 (Tex. 1969).
[138] 447 S.W.2d 746 (Tex. Civ. App.—Houston 1969).
[139] *Id.* at 749.
[140] 445 S.W.2d 20 (Tex. Civ. App.—Houston 1969).
[141] 446 S.W.2d 348 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

Three cases involved comment by counsel upon the failure to call a witness. In *Johnson v. Smith*[142] the court of civil appeals reiterated the rule that counsel is permitted to comment on the failure of his adversary to call a witness, and to conclude that such failure raises a presumption that the testimony, if produced, would be unfavorable. However, the prerequisites for such comment are that the absent witness (1) must be under the control of or related in some manner to the opponent, and (2) must have had some material information on the point in issue. In *Gifford v. Woodruff*[143] the appellate court held that it was prejudicial error for the plaintiff to mention in argument the defendant's failure to call an investigating officer and ambulance driver where it was not shown that these parties were in any way associated with the defendant. An identical result was reached in *Magaline v. J. V. Harrison Truck Lines, Inc.*,[144] where the defendant's attorney repeatedly referred to witnesses who lacked the required relationship to the plaintiff and stated what they would have testified to.

A series of objectional arguments was considered in *Texas Employers' Insurance Association v. Hacker.*[145] In this workmen's compensation case, the plaintiff argued hardship, even though hardship had been stipulated out of the case. He argued that one of the doctors who testified was a "notorious insurance company doctor;"[146] that one of the adjusters had been "dogging this Court-room all week;"[147] that he got "steamed up"[148] when he saw an insurance company "kick a workman down" by slow payments; that the jury should apply the "Golden Rule."[149] The appellate court held that the argument as to hardship was improper; that there was no evidence that the doctor was a notorious insurance company doctor and to so argue was error; that since the adjuster had been properly called for jury service and excused from the panel, that argument was improper; that the argument on the powerful insurance company was surely prejudicial; but that the "Golden Rule" argument was approved by the Texas supreme court,[150] and that evidence of slow payment was in the record. On the record as a whole, the court found that the instructions of the trial court would have been ineffective to cure the error, and that such statements were prejudicial and probably did cause the rendition of an improper judgment.

Miscellaneous. An insurance company was subjected to onerous penalties for failure to comply strictly with a judgment in *Home Indemnity Co. v. Muncy.*[151] The plaintiff recovered a judgment of $225,000 against the

[142] 446 S.W.2d 357 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*
[143] 448 S.W.2d 804 (Tex. Civ. App.—Beaumont 1969).
[144] 446 S.W.2d 920 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*
[145] 448 S.W.2d 234 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*
[146] *Id.* at 239.
[147] *Id.*
[148] *Id.* at 240.
[149] *Id.*
[150] Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943).
[151] 449 S.W.2d 312 (Tex. Civ. App.—Tyler 1969), *error ref. n.r.e.*

defendant's insured. The defendant's policy limited liability coverage to $5,000 plus supplementary payments of interest on the entire judgment which accrued after entry of the judgment and before the company paid or tendered a deposit in the court for that part of the judgment covered by liability limits. The judgment was rendered on April 10, and on April 14, the defendant deposited $5,000 into the registry of the court. On April 15, the judgment was amended to include joint and several liability which had been omitted by oversight. In a suit to recover interest on the judgment, the plaintiff argued that the insurance company was liable for interest on the entire amount of the judgment. The appellate court affirmed this view. The court held that the amended judgment constituted a clerical change. Since there was nothing in the record to assist in the determination of whether this was a clerical or judicial error, the court adopted the rule of a presumption in favor of the original judgment. Thus, the defendant was liable for four days' interest on the judgment at the time it deposited $5,000 into the court. The insurance company, therefore, had not discharged its liability under the supplemental-payments clause of the policy. Thus, interest on the entire $225,000 continued to accrue from the date of the judgment, April 1964, to the date of the appellate court's decision in 1969, and the insurance company was liable for the full amount of interest. The decision is based on good legal grounds by a careful analysis of both the policy and the law applicable to judgments, and it serves to illustrate that significant liability may be incurred for failure to comply completely with the policy and the judgment.

Conclusion. Among procedural developments during the survey period was the promulgation of certain changes to the rules which became effective January 1, 1971.[152] Most of the changes were housecleaning procedures, but several deserve mention. Rule 201[153] was amended and rules 202[154] and 203[155] were repealed to eliminate the necessity of applying for the issuance of a commission to take oral depositions. All that is now required is the giving of notice of the time and place of the depositions. Other changes include: rule 39,[156] joinder of parties, was rewritten to coincide with federal rule 19;[157] rule 97[158] now expressly provides that settlement with one party does not operate as a bar to a constitution of the action against any remaining parties; rule 167[159] now allows the discovery of the identity and location of any potential party or witness; rule 189[160] was rewritten to dispense with the requirement of filing notice of intent to depose on written interrogatories and to require ten days' notice; rule 220[161]

[152] The amendments were adopted by an order of the Supreme Court of Texas dated July 21, 1970.
[153] TEX. R. CIV. P. 201.
[154] *Id.* 202.
[155] *Id.* 203.
[156] *Id.* 39.
[157] FED. R. CIV. P. 19.
[158] TEX. R. CIV. P. 97.
[159] *Id.* 167.
[160] *Id.* 189.
[161] *Id.* 220.

now provides that the failure of a party to appear for trial is deemed a waiver of a jury trial; and rules 193[162] and 194[163] have been repealed. A number of cases which are of some interest are included in a footnote.[164]

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[162] *Id.* 193.

[163] *Id.* 194.

[164] *Abatement*: Southwestern Inv. Co. v. Neeley, 443 S.W.2d 573 (Tex. Civ. App.—Fort Worth 1969), *rev'd and remanded on other grounds*, 452 S.W.2d 705 (Tex. 1970) (a plea in abatement timely filed, but not presented to the court before trial, is waived).

Appeal:

Motion for New Trial: Reynolds v. Reynolds, 452 S.W.2d 950 (Tex. Civ. App.—Dallas 1970) (rule that only one amended motion for new trial may be filed is mandatory).

Notice: Crow v. Batchelor, 453 S.W.2d 297 (Tex. 1970) (notice is not required on appeal from interlocutory order).

Time Limits: Holliday v. Holliday, 453 S.W.2d 512 (Tex. Civ. App.—Corpus Christi 1970) (in the absence of a *timely filed* motion for an extension of time to file statement of facts appellate courts have no authority to permit a late filing); Torres v. Western Cas. & Sur. Co., 449 S.W.2d 148 (Tex. Civ. App.—Austin 1969), *error granted* (where summary judgment is granted, appellate time limits are extended by filing motion for new trial).

Attorney's Fees: Eisenbeck v. Buttgen, 450 S.W.2d 696 (Tex. Civ. App.—Dallas 1970) (a contract concerning payment of gross earnings of a business is not a special contract under TEX. REV. CIV. STAT. ANN. art. 2226 (1964) and attorney's fees were not recoverable in a suit on the contract).

Declaratory Judgment: State v. Fuller, 451 S.W.2d 573 (Tex. Civ. App.—Beaumont 1970), *error granted* (the effect of a declaratory judgment is not to merge a cause of action in the judgment or to bar it, but is res judicata only as to the matters declared by the judgment).

Dismissal: New Friendship Baptist Church v. Collins, 453 S.W.2d 529 (Tex. Civ. App.—Houston 1970) (dismissal for lack of jurisdiction is not a bar to a subsequent suit on the same cause of action).

Injunctions: West v. Pennyrich Int'l, Inc., 447 S.W.2d 771 (Tex. Civ. App.—Waco 1969) (an order granting a temporary injunction must detail the reasons for granting and the specific acts enjoined).

Judgments:

Default Judgment: Jack Ritter Inc. Oil Co. v. Sell, 443 S.W.2d 925 (Tex. Civ. App.—Austin 1969) (where plaintiff fails to appear after consolidation of his suit with separate action of defendant, trial court is not authorized to enter take-nothing judgment against plaintiff and grant defendant's affirmative relief, but can only dismiss plaintiff's suit for want of prosecution).

Summary Judgment: Tubb v. Carter-Gragg Oil Co., 455 S.W.2d 843 (Tex. Civ. App.—Tyler 1970), *error ref. n.r.e.*, and Layne v. Darnell, 454 S.W.2d 474 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.* (where determination of motion for summary judgment involved credibility, weight, or inference of evidence, summary judgment is not proper); Ellis v. Sinton Sav. Ass'n, 455 S.W.2d 834 (Tex. Civ. App.—Corpus Christi 1970), *error ref. n.r.e.* (where movant's summary judgment affidavits reveal evidence sufficient to sustain instructed verdict at trial, opponent has the burden to show opposing evidence raising a material fact issue).

Validity: Central Sur. & Ins. Corp. v. Anderson, 445 S.W.2d 514 (Tex. 1969) (judgment declaring liability insurer would be liable to pay if liability found against insured is invalid as an advisory opinion).

Mistrial: Brown v. Friedman, 451 S.W.2d 588 (Tex. Civ. App.—Houston 1970) (failure to object to improper argument when made constitutes a waiver of right to mistrial); M.L. Mayfield Petroleum Corp. v. Kelly, 450 S.W.2d 104 (Tex. Civ. App.—Tyler 1970), *error ref. n.r.e.* (where jury struck some issues and trial court rendered verdict on answered issues, failure to object before the jury was discharged constituted a waiver of right to urge motion for mistrial).

Parties: Campbell v. Jefferson, 453 S.W.2d 336 (Tex. Civ. App.—Tyler 1970), *error dismissed*; Gulf Ins. Co. v. Snyder, 446 S.W.2d 947 (Tex. Civ. App.—Amarillo 1969) (a subrogated carrier with notice of a subsequent suit by the insured waives its subrogation claim by not intervening).

Special Issues: Griffey v. Travelers Ins. Co., 452 S.W.2d 725 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.* (request for 18 special issues in one instrument constitutes a waiver of complaint for refusal to submit).

Stipulations: Wilkins v. Cook, 454 S.W.2d 769 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.* (a stipulation must be formally retracted before contradictory evidence can be introduced).